BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATSY LEUTY	)	
Claimant	)	
VS.	)	
	)	Docket No. 262,807
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Claimant appealed the October 17, 2002 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on April 8, 2003. Stacy Parkinson of Olathe, Kansas, was appointed Board Member pro tem to serve in place of retired Board Member Gary M. Peterson.

APPEARANCES

Carlton W. Kennard of Pittsburg, Kansas, appeared for claimant. William L. Phalen of Pittsburg, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that she injured her back working for respondent from March 21 through March 28, 2000. In the October 17, 2002 Award, Judge Frobish determined claimant had a five percent permanent partial general disability. The Judge denied claimant's request for a work disability (a permanent partial general disability greater than the functional impairment rating) after finding that claimant voluntarily quit an accommodated job as a telephone operator that respondent had provided.

Claimant contends Judge Frobish erred. Claimant argues that she was unable to perform the telephone operator job and was, therefore, forced to terminate her employment. Accordingly, claimant requests the Board to find that she has a 66 percent task loss and a 100 percent wage loss for an 83 percent work disability.

Conversely, respondent and its insurance fund request the Board to affirm the October 17, 2002 Award.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes the October 17, 2002 Award should be affirmed.

Claimant was employed by respondent (the State of Kansas) as a mental retardation technician at Parsons State Hospital. In March 2000, claimant assisted a coworker in restraining a hospital client who was fighting with the hospital staff. After that incident, claimant had symptoms in her low back, right knee and right leg. Claimant prepared an accident report the next day.

Following the March 2000 incident (which the attorneys identified as March 15, 2000 at claimant's July 2001 deposition), claimant continued working for respondent through April 2000, although she missed some work. Claimant believes she did not work in May 2000 but returned to work in June 2000 and then worked through November 2000. According to claimant, on November 6, 2000, Dr. Laurie Behm again gave her work restrictions and she worked approximately three more weeks as a mental retardation technician until respondent told her the hospital did not have a job for her and respondent laid her off.

Considering claimant's testimony in light of the time records that were placed into evidence, on December 11, 2000, claimant began working as a telephone switchboard operator for the hospital. Claimant worked that job less than one month as the time records show her last day of work being December 31, 2000. According to claimant, she was unable to perform the telephone operator job as it required her to sit for hours, which bothered her back. The hospital placed claimant on leave without pay on February 11, 2001. And when claimant testified at the June 2002 regular hearing, she had been terminated by respondent and had not worked anywhere since leaving respondent's employment.

Claimant received treatment for her low back symptoms from a number of doctors. Claimant initially received treatment from her personal physician, Dr. Culver, who

prescribed medications. Later, claimant saw Dr. Komes in Pittsburg, Kansas, who also prescribed medications and sent claimant for an MRI and physical therapy. Additionally, Dr. Komes referred claimant to neurosurgeon Dr. Paul S. Stein of Wichita, Kansas, for an evaluation. According to claimant, Dr. Stein did not believe she was a candidate for surgery.

Claimant believes that she then saw Dr. King. And later, claimant sought treatment from Dr. Laurie Behm of Joplin, Missouri, who injected claimant's low back and prescribed medications. On November 6, 2000, Dr. Behm released claimant with a permanent 20-pound lifting restriction and restrictions against more than occasional bending and against restraining clients. On that date, Dr. Behm also rated claimant as having a five percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

When claimant testified at her July 2001 deposition, she had returned to her personal physician who was prescribing medications for her low back. In addition, claimant was evaluated by Dr. Philip R. Mills of Wichita, Kansas, at the Judge's request. Dr. Mills saw claimant in June 2001 and diagnosed lumbosacral sprain, sacroiliac strain, degenerative disk disease and depression. Dr. Mills agreed with Dr. Behm's five percent whole person functional impairment rating and the November 6, 2000 work restrictions.

The principal question in this claim is whether claimant could physically perform the switchboard operator job or whether she quit that job without justification. As indicated above, claimant testified the job bothered her back and that she was unable to get up and walk around as needed to relieve her low back symptoms. Claimant also testified that she tried to telephone Dr. Behm but the doctor did not return her phone calls. Moreover, claimant testified that her personal physician, Dr. Culver, took her off work and continued to have her off work when she testified at the June 2002 regular hearing. But claimant's problems with the switchboard job did not end with her back complaints. At the regular hearing claimant described how she was unable to sleep and that she felt she was having a nervous breakdown. She testified, in part:

> I worked the switch *[sic]* shift which I couldn't sleep, I couldn't, I could only sleep two or three hours a day. I got the shakes, I just felt like I was having a nervous breakdown.[1]
>
> . . . .
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> I didn't like those hours, I couldn't sleep.[2]

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[1] R.H. Trans. at 14-15.

[2] *Id.* at 31.

> . . . .
>
> I didn't mind the job. Did I like the swing shift, I didn't like it because I couldn't sleep.
>
> . . . .
>
> And I didn't like it because I was in pain.[3]

Although claimant testified that she could not perform the switchboard job as she was required to sit for hours, claimant also testified that she could get up and walk around while performing that job as long as she remained nearby to answer the phone.

The Board concludes that claimant's injury did not preclude her from performing the switchboard operator job. The Board finds that the greater weight of the evidence indicates that claimant was capable of getting up and walking around as needed in that job. That finding is supported by the testimony from Gary J. Daniels, who is the hospital's administrator. Dr. Daniels' testimony regarding how the operators are permitted to sit and stand at their leisure is persuasive. Moreover, both Dr. Mills and Dr. Behm testified that claimant should be able to perform the operator job if she is allowed to sit and stand as needed.

The Board concludes that respondent accommodated claimant's low back injury by providing jobs within her work restrictions and limitations. Respondent first permitted claimant to return to her mental retardation technician job with the understanding that she would not restrain clients. When claimant was laid off in late November 2000, respondent then provided claimant with the switchboard operator job that permitted her to sit and stand as needed.

Claimant's permanent partial general disability benefits are governed by K.S.A. 1999 Supp. 44-510e, which provides:

> **Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto.** The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning

[3] *Id.* at 32.

> after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

The Kansas Court of Appeals in *Watson*[7] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Id.* at 320.

[7] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

> determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[8]

As claimant quit the switchboard operator job without justification, the wage from that job should be imputed to her for purposes of the permanent partial general disability formula. The record indicates that the switchboard operator job paid at least 90 percent of claimant's average weekly wage at the time of the accident. Accordingly, claimant's permanent partial general disability is limited to the whole person functional impairment rating, which is five percent.

AWARD

WHEREFORE, the Board affirms the October 17, 2002 Award entered by Judge Frobish.

IT IS SO ORDERED.

Dated this ____ day of May 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
William L. Phalen, Attorney for Respondent and its Insurance Fund
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation
Fred Spigarelli[9]

[8] *Id.* at Syl. ¶ 4.

[9] On November 6, 2002, the Spigarelli law firm filed a Statement of Attorney Fee Lien with the Division of Workers Compensation.